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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE UPPER DECK COMPANY, INC., Plaintiff and Respondent, v. JOSEPH PIROZZI et al., Defendants and Appellants.	D068316 (Super. Ct. Nos. 37-2011-00100599-CU-BC-CTL, 37-2012-00056843-CU-BT-NC)

APPEAL from a judgment of the Superior Court of San Diego County, Richard E. L. Strauss, Judge. Affirmed.

Oddenino & Gaule and John V. Gaule for Defendants and Appellants.

Nicholas & Tomasevic and Craig M. Nicholas for Plaintiff and Respondent.

I.

INTRODUCTION

Plaintiff The Upper Deck Company, Inc. (Upper Deck) filed suit against J&T Hobby and Joseph Pirozzi (jointly the J&T Hobby defendants), alleging that the J&T

Hobby defendants owed Upper Deck almost $2 million dollars pursuant to a distributor agreement. After four days of trial, a jury awarded Upper Deck $1.8 million in damages.

On appeal, the J&T Hobby defendants contend (a) that counsel for Upper Deck presented improper closing argument, and (b) that the trial court erred in denying the J&T Hobby defendants' request for a continuance in order to permit them to pursue the testimony of a former employee of Upper Deck. We conclude that neither contention has merit, and therefore affirm the judgment.

II.

FACTUAL AND PROCEDURAL BACKGROUND

Upper Deck sold trading card products to J&T Hobby pursuant to a distribution agreement. Pirozzi, the president of J&T Hobby, signed a personal guarantee of J&T Hobby's payment obligations.

On November 4, 2011, Upper Deck filed a lawsuit to recover the balance it believed J&T Hobby owed. In August 2012, J&T Hobby filed a lawsuit against Upper Deck seeking damages and cancellation of the distribution agreement on the ground that Upper Deck's founder and CEO at the time the distribution agreement was entered into purportedly concealed his ownership interest in two other distributors and gave those distributors preferential treatment. The lower court consolidated the two cases in 2014.

Trial was initially set for June 6, 2014. The trial was continued a number of times and ultimately commenced on March 2, 2015. After four days of trial, the jury awarded Upper Deck more than $1.8 million.

III.

DISCUSSION

A. *The J&T Hobby defendants forfeited their contention that opposing trial counsel committed misconduct during closing argument*

Prior to trial, Upper Deck moved in limine to exclude evidence of J&T Hobby's lost revenue/profits and business market value. Upper Deck contended that such evidence should be excluded because there was a limitation of damages clause in the distributor contract, the evidence would necessarily be based on hearsay, the J&T Hobby defendants should have, but failed to, designate an expert to testify regarding any lost profits and the business market value of J&T Hobby's business, and any evidence regarding lost revenue/profits would be speculative. The trial court granted Upper Deck's motion on the ground that lost profits were not recoverable under the contract between the parties. In compliance with the court's ruling, the J&T Hobby defendants did not attempt to admit balance sheets, profit and loss statements, or other financial documents during trial.

During Upper Deck's closing argument, Upper Deck's counsel made the following remarks, which the J&T Hobby defendants now challenge on appeal:

> "Folks, to show that he would have come to you and he would have said, 'Here is my books, here is my records, here is my sales, here is what I was selling, here is Edgeman's sales, here is what they are selling, here is what went from me to Edgeman, here is what I lost.' You received none of that. He has the burden of proof. He gave you none of that. And you are going to have to ask yourselves when you're in the jury room which is if he is going to say that it caused him harm and that sales were lost to Edgeman, then why in the world didn't he give us his books and records? Why in the world do we not have his profit and loss statements? Why did we not walk

> through that? Why didn't he subpoena Edgeman's profit and loss statements? Why didn't he take a deposition of Edgeman and find out where their balance sheets are, where their registers of the products that they received?"

The J&T Hobby defendants did not object to these statements.

Because the J&T Hobby defendants did not object to the statements during closing argument, they have forfeited their ability to argue on appeal that these comments by Upper Deck's counsel were improper. An objection and request for a curative instruction must be made during trial in order to preserve a challenge to alleged misconduct on appeal. (*People v. Williams* (1997) 16 Cal.4th 153, 254-255.) "Generally a claim of misconduct is entitled to no consideration on appeal unless the record shows a timely and proper objection and a request that the jury be admonished. . . . The purpose of the rule requiring the making of timely objections is remedial in nature, and seeks to give the court the opportunity to admonish the jury, instruct counsel and forestall the accumulation of prejudice by repeated improprieties, thus avoiding the necessity of a retrial. . . . In the absence of a timely objection the offended party is deemed to have waived the claim of error through his participation in the atmosphere which produced the claim of prejudice." (*Horn v. Atchison T. & S. F. Ry. Co.* (1964) 61 Cal.2d 602, 610, citations omitted.)

Because the J&T Hobby defendants did not object to Upper Deck's counsel's comments during closing argument, they may not rely on the statements in question as a basis for seeking reversal of the judgment.

B. *The trial court did not abuse its discretion in denying the J&T Hobby defendants' oral request to continue the trial on the day that trial was set to commence*

On the first day of trial, the J&T Hobby defendants orally raised a concern, arguing that they needed a continuance of the trial because they had not been able to ensure that Dominick Magliaro, a former employee and/or officer of Upper Deck, would be appearing at trial to testify as a witness for the J&T Hobby defendants. The J&T Hobby defendants suggested that Upper Deck's counsel had been intimidating Magliaro to prevent him from testifying. Magliaro, who left his employment with Upper Deck in October 2005, was, at the time of trial, a resident of New York. The J&T Hobby defendants had identified Magliaro as a witness in their discovery responses in December 2012 and were aware that he resided in New York. They did not subpoena Magliaro for a deposition in New York between that time and the time of trial in March 2015.

Although Magliaro had been identified by the J&T Hobby defendants as a potential witness, Magliaro provided Upper Deck with a declaration, signed under penalty of perjury, stating that he lacked knowledge of information that would support the J&T Hobby defendants' complaint.[1]

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[1] Specifically, Magliaro stated, "I have no knowledge whether Upper Deck helped grow J&T's business over time and I have no knowledge whether Upper Deck caused J&T's business to decline or fail since my employment with Upper Deck separated in October of 2005." A copy of Magliaro's declaration was produced to the trial court in response to the J&T Hobby defendants' motion for a new trial. The declaration was quoted by Upper Deck's counsel during the discussions regarding the J&T Hobby defendants' oral request for a continuance to attempt to secure Magliaro's testimony for trial. Upper Deck's counsel also read to the court an e-mail from Magliaro's attorney, stating that his client did not intend to testify at trial in California.

" 'The decision to grant or deny a continuance is committed to the sound discretion of the trial court.' " (*Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th 1112, 1126 (*Thurman*).) The trial court's denial of a trial continuance "will be upheld if it is based on a reasoned judgment and complies with legal principles and policies appropriate to the case before the court. [Citation.] A reviewing court may not disturb the exercise of discretion by a trial court in the absence of a clear abuse thereof appearing in the record." (*Forthmann v. Boyer* (2002) 97 Cal.App.4th 977, 984-985; see also *Thurman, supra,* at p. 1126.)

Under the circumstances presented on this record, the J&T Hobby defendants have not demonstrated that the trial court abused its discretion in denying their request for a continuance of the trial in order to attempt to secure Magliaro's attendance at trial. First, the request for a continuance was procedurally defective. Rule 3.1332(b) of the California Rules of Court governs motions or applications to continue trial and requires that "[a] party seeking a continuance of the date set for trial, whether contested or uncontested or stipulated to by the parties, must make the request for a continuance by a noticed motion or an ex parte application under the rules in chapter 4 of this division, with supporting declarations." (Cal. Rules of Court, rule 3.1332(b).) The record does not reveal the existence of either a noticed motion or an ex parte application to continue the trial in order to allow the J&T Hobby defendants to obtain Magliaro's testimony, nor does it include any declarations in support of this particular request for a continuance. Thus, the J&T Hobby defendants have not demonstrated that they complied with the procedural requirements for obtaining a trial continuance. The trial court acted well within its

discretion in denying a procedurally deficient request for a continuance at the commencement of trial.

Further, even if the request for a continuance had met the procedural requirements, the trial court nevertheless did not abuse its discretion in denying the request because the record does not demonstrate that the J&T Hobby defendants made a sufficient showing of good cause to justify the request.

Trial dates "are firm" and "[a]ll parties and their counsel" are instructed to "regard the date set for trial as certain." (Cal. Rules of Court, rule 3.1332(a).) Thus, trial continuances are considered "disfavored" and may be granted by the trial court "only on an affirmative showing of good cause." (*Id.*, rule 3.1332(c).) A circumstance that may indicate good cause includes "[t]he unavailability of an essential lay or expert witness because of death, illness, or other excusable circumstances." (*Id.*, rule 3.1332(c)(1).) Here, the record shows that the witness whose testimony the J&T Hobby defendants were seeking was not essential. Magliaro had signed a declaration, under penalty of perjury, attesting that he had no personal knowledge of the events, circumstances, or claims at issue in this case. Further, the J&T Hobby defendants could have subpoenaed Magliaro for a deposition in his home state of New York if they had wanted to guarantee their ability to obtain Magliaro's testimony. They chose not to do so. Given the J&T Hobby defendants' lack of diligence with respect to obtaining Magliaro's testimony prior to trial, as well as Magliaro's declaration attesting to his lack of knowledge with respect to the issues in this case, we conclude that the trial court did not abuse its discretion in denying another continuance at the time trial was set to commence.

IV.

DISPOSITION

The judgment is affirmed.

AARON, J.

WE CONCUR:

BENKE, Acting P. J.

O'ROURKE, J.